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IN THE

Supreme Court of the United States

October Term, 1966

No. 602

FLETA A. JONES, as Natural Parent of the Minor, BRENDA WARE,

Petitioner,

vs.

AETNA CASUALTY & SURETY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

ROBERT H. ASHLEY, JR.
LEONARD POWERS
[illegible]
Attorneys for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES

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No. _____

FLETA A. JONES, as Natural Tutrix
of the Minor, BRENDA WARE,
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Versus

AETNA CASUALTY & SURETY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

TO THE HONORABLES THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Fleta A. Jones, as Natural Tutrix of, and for and on behalf of, the minor, Brenda Ware, hereby petitions this Honorable Court for a Writ of Certiorari to review the judgment and decree of the Supreme Court of Louisiana, rendered and entered against petitioner's ward in the matter numbered 48,785, *sub nom. Earl Jackson Jones, et al. v. Aetna Casualty & Surety Company*, on June 20, 1967. (R. 2)

OPINIONS BELOW

This case was tried to a jury in the First Judicial District Court for the Parish of Caddo, Louisiana; judgment was entered on the jury's verdict in favor of petitioner's ward without opinion by the Trial Court. (R. 213-215)

The opinion of the Court of Appeal, Second Circuit, State of Louisiana (No. 10,789), is reported in 198 So. 2d 523 (1967) and is reprinted in Appendix "A" hereof.

The judgment and decree of the Supreme Court of Louisiana, rendered June 20, 1967, is reported in 199 So. 2d 926 (1967) and is reprinted in Appendix "B" hereof.

JURISDICTION

On June 20, 1967, the Supreme Court of Louisiana refused writs of certiorari or review to the Louisiana Court of Appeal, Second Circuit, to review its judgment and decree of April 19, 1967, as to which that Court denied application for rehearing on May 18, 1967. These judgments were rendered by virtue of Louisiana constitutional provisions which are contrary to, and in derogation of the rights secured to petitioner's ward by, the Constitution of the United States; therefore, the jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 U.S.C. 1257(3); June 25, 1948; c. 646, 62 Stat. 929.

THE QUESTIONS PRESENTED FOR REVIEW

I. Are findings of fact made by a jury in a state court damage action protected against appellate review except in accordance with the rules of the common law?

II. Is a jury's evaluation of damages in a personal injury action a finding of fact within the meaning of the Seventh Amendment to the United States Constitution?

III. May a state appellate court render a judgment for a lesser amount of general damages than that found by a jury, or may that appellate court only order a *remittitur* as an alternative to a new trial of *quantum?*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

State constitutional provisions:

Article 7, §10, Louisiana Constitution of 1921, as amended:

> "The Supreme Court has control of, and general supervisory jurisdiction over all inferior courts.
>
> * * *
>
> "In civil actions, its appellate jurisdiction extends to both the law and the facts. In criminal matters, its appellate jurisdiction extends to questions of law only."

Article 7, §29, Louisiana Constitution of 1921, as amended:

> "All appeals of which the courts of appeal have appellate jurisdiction . . . shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other Section of this Constitution."

Federal constitutional provisions:

Amendment VII:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

State statutes:

Article 2315, Louisiana Revised Civil Code of 1870:

> "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it."

STATEMENT OF THE CASE

Petitioner's ward, Brenda Ware, six years of age, was one of several persons injured in a collision of two automobiles on August 8, 1965 in Caddo Parish, Louisiana. (R. 423)

Respondent, Aetna Casualty & Surety Company, insured one of the vehicles and was sued directly pursuant to Louisiana's direct action statute (Louisiana Revised Statutes of 1950, 22:665, as amended) in the First Judicial District Court for the Parish of Caddo, Louisiana. Respondent admitted liability. (R. 424, 426)

The case was tried to a jury which fixed the child's general damages for severe facial injuries and scarring at $6,500.00.[1] (R. 213)

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[1]Originally, there were six claimants, four majors and two minors, both represented by petitioner as tutrix; the aggregate jury verdict was $197,632.90; reducing all awards, except the $500.00 verdict in favor of petitioner's other ward, Janie Ware, the Court of Appeal, Second Circuit, *rendered* judgment for a total of only $105,122.47. All of the other claims have been settled; however, petitioner, as a fiduciary, could not conscientiously acquiesce in the judgments of the lower courts which she believes violate the rights secured to the minor, Brenda Ware, under the Constitution of the United States.

Post-trial motions, including for a *remittitur*, were filed and presumably denied by the Trial Court which entered judgment against respondent in the amount of the jury's verdict. (R. 213-215)

Respondent appealed to the Louisiana Court of Appeal, Second Circuit, (R. 592), seeking relief from the amount of the judgment. The Louisiana appellate court agreed with respondent that the verdict and the judgment thereon were excessive; however, instead of remanding with an alternative to petitioner to accept a *remittitur*, the appellate court *reduced the child's award* from $6,500.00 to $3,500.00 *and rendered a judgment* for the lesser amount. (R. 400, 402)

THE FEDERAL QUESTION

The federal question first arose in this matter and was brought to the attention of the courts below in the form of petitioner's application for a rehearing in the Court of Appeal, Second Circuit (R. 160) wherein, *inter alia*, petitioner contended that *quantum* of damages is a question of fact which, when found by a jury, is protected against appellate review, except in accordance with the rules of the common law, by Amendment VII to the Constitution of the United States and that the appellate Court's *rendition* of judgment for a lesser amount thereby deprived petitioner's ward of property (in the form of the lower court's judgment entered on the jury's verdict) without due process of law, in violation of Amendments V and XIV of the United States Constitution. (R. 162)

The Louisiana Court of Appeal, Second Circuit, passed upon petitioner's said contentions under federal law by its denial of her application for rehearing. (R. 163A)

From this denial of rehearing, petitioner timely applied to the Supreme Court of Louisiana for writs of certiorari or review to the Louisiana Court of Appeal, Second Circuit (R. 3-6), which application for writs, also presenting the federal question (R. 5), was refused by the Supreme Court of Louisiana on June 20, 1967. (R. 2)

REASONS FOR GRANTING THIS APPLICATION

This petition squarely presents for reconsideration by this Honorable Court the important Constitutional question: Does the Seventh Amendment to the Constitution of the United States apply to the several states insofar as that Amendment protects jury-found facts in civil cases against appellate review except in accordance with the rules and principles of the common law? Current and recent decisions of this Court clearly indicate that prior decisions purporting to answer this question should be re-examined and overruled.

ARGUMENT

All of the clams in the instant case were based upon the provisions of Article 2315 of the Louisiana Revised Civil Code of 1870 which is the State's general tort article, imposing civil liability for negligent conduct which causes injury. (R. 211) Although statutory in form, this Article has been held specifically to be "only an embodiment of the common-law right of action for tort." *Gray v. New Orleans Drydock & Shipbuilding Co.*, 146 La. 826, 838, 84 So. 109 (1920). The instant action was, therefore, for all intents and purposes, a "suit at common law" as that phrase is used and intended in Amendment VII to the Constitution of the United States.

In the instant case, the jury found that petitioner's ward had sustained damages as a result of the negligence of respondent's insured in the amount of $6,-500.00. This finding was a finding of *fact. Dimick v. Schiedt,* 293 U.S. 473, 79 L. Ed. 603 (1934).

Amendment VII to the Constitution of the United States specifically provides in part that no *fact* tried to a jury shall be otherwise re-examined except in accordance with the rules of the common law.

Amendment XIV to the United States Constitution provides in part that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law.

Petitioner urges to this Honorable Court that one of the privileges of petitioner's ward as a citizen of the United States was that of having the amount of her damages fixed in a trial by jury, an *efficacious* trial by jury, and that, by *rendering* a judgment for a lesser amount than that found by the jury which tried this case, the Louisiana courts have re-examined a jury-found fact in a manner not according to the rules of the common law and, thereby, have deprived petitioner's ward of her property right in that jury verdict and the original judgment rendered thereon without due process of federal constitutional law.

This Honorable Court, in 1876, said that the Seventh Amendment, guaranteeing an efficacious trial by jury in civil cases, was not applicable to state court litigation. *Walker v. Sauvinet,* 92 U.S. 90, 23 L. Ed. 678 (1876).

In 1964, however, this Honorable Court further said:

> "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan,* 378 U.S. 1, 12 L. Ed. 2d 653, 657-658 (1964).

Petitioner urges that if this Honorable Court were to re-examine its decision in *Walker v. Sauvinet, supra,* it would find that its *Walker* decision intrinsically rests

upon pre-Fourteenth Amendment decisions and judicial conceptions.[2]

There is no American historical basis for the conclusion that the right to a trial by jury in a civil case is any less sacred a privilege of United States citizenship, for example, than the privilege against self-incrimination which the States were held obliged to respect in *Malloy v. Hogan, supra,* specifically and unequivocally reversing and overruling the contrary prior de-

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[2]The only authority cited in *Walker* for the proposition that Amendment VII does not apply to the several States is *Edwards v. Elliott,* 21 Wall. 557, 22 L.Ed. 492 (1874) in which the observation appears as little more than *dictum,* purporting to be supported by: (1) *Barron v. Baltimore,* 7 Pet. 243, 8 L. Ed. 672 (1833) holding that the Fifth Amendment's prohibition against taking of private property for public use without just compensation is not enforceable against state action (repudiated in *Chicago, B. & Q. R. Co. v. City of Chicago,* 166 U. S. 226 (1896) as per dissent of Mr. Justice Brennan in *Cohen v. Hurley,* 366 U.S. 117 (1961) at p. 155); (2) *Twitchell v. Comm'r,* 7 Wall. 326 (1868) holding that the Sixth Amendment's requirement of informing the accused of the nature and cause of the accusation against him did not apply in a state proceeding (rejected at least by implication in *Pointer v. Texas,* 380 U. S. 400 (1965); (3) *Livingston v. Moore,* 7 Pet. 469 (1833) holding that *none* of the first ten amendments apply to the states (though proclaiming that a trial by jury in a civil case "is justly regarded in every State of the Union, as among the most inestimable privileges of a freeman"); (4) *Fox v. Ohio,* 5 How. 434 (1847) holding that the Fifth Amendment's double jeopardy prohibition does not apply to the states (repudiated by a majority of the present members of this Honorable Court via dissents in *Bartkus v. Illinois,* 359 U. S. 121 (1959) at pp. 150 *et seq.* and in *Chicos v. Indiana,* 385 U.S. 76, 17 L.Ed.2d 175, 179-180 (1966); and (5) *Smith v. Maryland,* 18 How. 76 (1855) observing via *dictum* that the Fourth Amendment's restrictions upon search warrants are inapplicable to state authorities (repudiated in *Mapp v. Ohio,* 367 U.S. 643 (1961).

cision in *Twining v. New Jersey* (53 L. Ed. 97; 1908) of fifty-six years' standing. See also, *Spevack v. Klein,* 385 U.S. 511, 17 L. Ed. 2d 574 (1967).

Indeed, the right to an efficacious civil trial by jury is, and has been said to be, "a fundamental guarantee of the rights and liberties of the people" (*Parsons v. Bedford,* et. al., 7 L. Ed. 432; 1830) and "among the most inestimable privileges of a free man" (*Livingston v. Moore,* 8 L. Ed. 751; 1833).

Petitioner does not question the prerogative of an appellate tribunal to find that a jury's damage award is so excessive as to be unconscionable; but, petitioner earnestly submits that, insofar as the Louisiana Constitution of 1921, Article 7, Sections 10 and 29, purport to confer upon Louisiana appellate courts the power to substitute their appraisal of damages for the jury's assessment thereof, said Sections are repugnant to Amendment VII to the Constitution of the United States, are in derogation of the rights of petitioner's ward under the provisions of Amendment XIV to the Constitution of the United States and are, therefore, unconstitutional.

Petitioner finally submits that the courts below have exceeded their federal constitutional authority in compelling petitioner's ward to accept a lesser amount in damages than awarded to her by a jury without affording the child an alternative of a new jury trial. Stated another way, the scope of review of the appellate courts below could not constitutionally exceed that of a Trial Court which, even under Louisiana law,

although empowered to grant a *remittitur*, may do so only as an alternative to a new trial. Louisiana Code of Civil Procedure, Article 1813;[3] cf. *Neely v. Eby Const. Co., Inc.*, 382 U.S. 914; 18 L.Ed. 2d 75 (1967).

CONCLUSION

For the foregoing reasons, this petition should be granted, in order that this Honorable Court may, redetermine whether or not the Seventh Amendment to the Constitution of the United States guaranteeing to all litigants the right of a meaningful civil jury trial, applies to Louisiana state court proceedings, to the end that it will be decided that said Amendment does so apply and that this cause should be remanded with directions to accord petitioner's ward her federally guaranteed constitutional right to a new and efficacious jury trial on the amount of the child's general damages:

All of which is

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[3]Art. 1813. "If the trial court is of the opinion that the verdict is so excessive or inadequate that a *new trial should be granted for that reason only*, it may indicate to the party or his attorney within what time he may enter a remittitur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, *as an alternative to a new trial*, and is to be entered only if the amount of the excess or inadequacy of the verdict or judgment can be separately and fairly ascertained. If a remittitur or additur is entered, then the court shall reform the jury verdict in accordance therewith." (Emphasis added)

Respectfully submitted

ROBERT B. NEBLETT, JR.
LEONARD FUHRER

By _____

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CERTIFICATE

I, the undersigned member of the Bar of this Court, do hereby certify that a copy of the above and foregoing petition for a Writ of Certiorari has been served upon the Respondent herein by depositing the same in the United States mails, air mail postage prepaid, addressed to Messrs. Lunn, Irion, Switzer, Johnson & Salley, Attorneys at Law, 500 Slattery Building, Shreveport, Louisiana, at New Orleans, Louisiana, this _____ day of September, 1967.

_____

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APPENDIX "A"

EARL JACKSON JONES et al.,
Plaintiffs-Appellees,

v.

AETNA CASUALTY & SURETY COMPANY,
Defendant-Appellant.

No. 10789.

Court of Appeal of Louisiana.
Second Circuit.

April 19, 1967.

Rehearings Denied May 18, 1967.

Lunn, Irion, Switzer, Johnson & Salley, Shreveport, for appellant.

Neblett & Fuhrer, Alexandria for appellees.

Before HARDY, GLADNEY and AYRES, JJ.

GLADNEY, Judge.

This appeal presents for review the amount of awards in favor of plaintiffs in damages by a jury verdict. The liability insurer, Aetna Casualty & Surety Company, appellant herein, contends the jury abused its discretion in awarding excessive and exorbitant amounts.

The action arises from an automobile accident which occurred on August 8, 1965, at which time Fleta A. Ware was driving an automobile owned by Earl Jackson Jones in a southerly direction on Louisiana Highway 1 about sixteen miles south of Shreveport in Caddo Parish, when the vehicle was struck head-on by an automobile owned by the American Loan Service, Inc., the insured of Aetna, and driven by Beverly J. Miles, Jr., who was killed in the accident. Prior to trial of the case, the defendant admitted liability and the case went to the jury solely upon the question of quantum.

After the rendition of the verdict by the jury, which the defendant considered as including grossly excessive awards, the trial court refused to grant a new trial or order remittiturs and this appeal was perfected from the judgment containing the following awards by the jury: Earl J. Jones, individually, the sum of $4,500.00; Earl J. Jones, as head and master of the community of acquets and gains existing between him and Fleta A. Jones, the sum of $18,800.00; Fleta A. Jones, for the use and benefit of the minor, Brenda Ware, the sum of $6,500.00; Fleta A. Jones, for the use and benefit of the minor, Janie Ware, the sum of $500.00; John D. Adams, as head and master of the community of acquets and gains existing between him and Mrs. Bertha Adams, the sum of $1,832.90, and to Bertha Adams, the sum of $95,000.00.

Specifications of error assigned by appellant are that: The district judge erred in signing a judgment based upon grossly excessive amounts, in refusing

to grant a new trial and in refusing to order a remittitur; the district judge erred in refusing to permit counsel to argue to the jury and inform it of awards made by the appellate courts in Louisiana in similar cases; the jury erred in awarding punitive damages and ignoring the charge of the court that such damages are not recoverable, and the jury erred in assessing and awarding grossly excessive amounts.

The errors relied upon by appellant in that the district court approved excessive amounts awarded by the jury and in refusing to order a remittitur or grant a new trial have not, in our opinion, unduly prejudiced the rights of the defendant. No showing is made that there was any misconduct on the part of the jury or that peremptory grounds for a new trial were presented as provided in C.C.P. arts. 1813, 1814 and 1972. Discretionary action on the part of the trial judge is permitted under C.C.P. arts. 1971 and 1973. The trial judge has much discretion regarding applications for a new trial. However, in a case of manifest error the appellate court will not hesitate to set the trial court's ruling aside or grant a new trial when timely applied for. Official Revision Comment to art. 1971. In Crier v. Marquette Casualty Company, 159 So.2d 26 (4th Cir. 1964, cert. denied) the court commented upon this principle of law, saying:

> "Although the jury's verdict is entitled to great weight, an appellate court is under the duty of passing upon the facts as well as the applicable law in a civil case and the court is duty bound to set aside the verdict of the jury

> if manifest error has been committed on questions of fact. LSA-Const. 1921, Art. VII, § 29, as amended; Thrash v. Continental Casualty, Co., La. App., 6 So. 2d 75." [159 So. 2d 26, 30]

Exception is also taken to the ruling of the district court in refusing to permit counsel to argue to the jury and inform it of awards made by the Appellate Courts in Louisiana in similar cases. We are referred to no instances in which there has been a ruling on this identical question. The case of Little v. Hughes, 136 So. 2d 448 (1st Cir. 1961) had under consideration the authority of the trial judge to prevent counsel from reading to the jury from law books during closing argument and it was held that any error resulting from such refusal was not harmful or prejudicial. The ruling is, we think, equally applicable to the question presented to this court. In the Little case the court stated:

> "Even if we were disposed to hold that it was error for the learned trial judge to prohibit counsel for defendant to read from a lawbook in his closing argument to the jury, we still find that defendant would not have been harmed nor prejudiced by such error. The jury verdict, both as to the findings of facts and the application of the law to the facts so found, are reviewable by this court. The ruling complained of did not keep any material fact away from the jury and defendant has had full opportunity to present the applicable law to this court. We would not be justified in remanding this cause for a new trial when we are in a

position to adjudicate this matter from the record made up in the trial court." [136 So. 2d 448, 452]

Nor do we find merit in the charge that the jury erred in awarding punitive damages and ignoring the charge of the court that such damages are not recoverable. A study of the exact charge as given by the trial judge to the jury discloses no ambiguity and in plain terms, charges the jury that punitive damages are not recoverable. The basis of the complaint is manifestly predicated on assumption and suspicion for there is no way for counsel to know that the action of the jury was punitive.

Before directing our attention to a consideration of quantum, reference is had to some of the established guidelines. After Gaspard v. LeMaire, 245 La. 239, 158 So. 2d 149 (1963), the Supreme Court gave further consideration to the abuse of discretion by a court or jury in assessing damages in the case of Ballard v. National Indemnity Company of Omaha, Nebraska, 246 La. 963, 169 So. 2d 64 (1964). Speaking through the Chief Justice, after commenting to the effect that in the review of damage assessment the general evidential rules of preponderance of evidence or manifest error are not pertinent and are without application since the only question is whether the lower court has abused its discretion in assessing damages, the opinion stated:

"In resolving the question of whether the jury in fixing the amount of the award in the Gas-

pard case had abused the discretion vested in it by law, we pointed out that '* * * In view of our codal provision, the appellate courts should consider the amounts of awards in other cases only so far as they are relevant to the question of whether the judge or the jury has abused its discretion in fixing the award in the case under consideration.' However, an appellate court should not fix the amount of the award solely to maintain uniformity of awards, thus ignoring the prerogatives of the trial judge or jury in assessing awards in such cases as set forth in Art. 1934 of the Civil Code. The amounts of awards in so-called 'similar' cases are relevant only to determine whether there has been an abuse of discretion, but for no other purpose—that is, to determine whether the award is so excessive or so inadequate as to be an abuse of discretion. In this connection it must always be remembered, as said in Gaspard, that '* * * cases relied upon may be similar in that each of them involves a similar injury such as a broken arm, the loss of an eye or eyes, or the loss of some member of the body. Thereafter, however, the similarity ceases for each case is different, and the adequacy or inadequacy of the award should be determined by the facts and circumstances peculiar to the case under consideration.' " [169 So. 2d 64, 67]

Within the bounds so prescribed, we next consider whether or not there was an abuse of discretion by

the jury in connection with the individual awards. Important evidence presented to the jury consisted of photographs which undoubtedly substantially affected their judgment particularly with reference to cosmetic damages. The writer of this opinion finds it impossible to adequately set forth a description of the disfigurement and changes in appearance as reflected in the photographic evidence. In attempting to reach a proper measure of damages in our review of whether or not the jury verdicts were so excessive as to constitute an abuse of discretion, we have studied the many cases cited as being comparables.

Especially informative have been two annotations found in 11 A.L.R.3d, pp. 9-364 entitled Excessiveness or Adequacy of Damages Awarded to Injured Person for Injuries to Arms, Legs, Feet, and Hands and pp. 370-713 entitled Excessiveness or Adequacy of Damages Awarded to Injured Person for Injuries to Head or Neck (1967). The comments therein are comprehensive with references to pertinent Louisiana decisions.

Earl J. Jones individually was awarded judgment for $4,500.00, which amount included special damages consisting of loss of pay for eleven weeks during disability, $880.00; for medical expenses $247.64; damages for the total loss of his automobile in the accident $375.00, a total of $1,502.61. After deducting this amount from the award of $4,500.00, it is evident that the jury allowed about $3,000.00 as damages for his personal injuries. These consisted of a two-inch laceration of the forehead, multiple abrasions and contusions of

both knees and the left chest wall. During a hospitalized period of six days an abscess developed in his right thumb which was opened and drained. His recovery took approximately eleven weeks. We do not consider the award as made by the jury excessive.

Earl J. Jones additionally sought damages as head and master of the community existing between himself and Fleta A. Ware Jones. In this connection the record discloses that at the time of the accident on August 8, 1965 Fleta A. Ware was married to Joe L. Ware from whom she secured a divorce on December 30, 1965. Janie Ware and Brenda Ware were children of this marriage. She married Earl Jackson Jones on December 31, 1965. There is no specification in the jury verdict or the judgment as to the basis for the allowance so made. The evidence indicates the award was for loss of wages which would have accrued to Fleta Ware Jones had she been able to continue with her employment after her marriage to Jones. The argument is made that because of her injuries Mrs. Jones was permanently disabled and there would be a loss of wages due the community. Mrs. Jones did sustain serious injuries to her right leg consisting of a fracture in the area of the mid and distal third of the right femur and a fracture of the kneecap. The orthopedic surgeon, Dr. A. E. Dean, estimated there would be permanent fifteen per cent disability. Additionally, Mrs. Jones completely lost the hearing of her right ear, which undoubtedly would be a handicap in her employment. The medical evidence does not sustain a finding that the injuries of Mrs. Jones, if permanent, would necessarily be of such a totally disabling nature

as to prevent her from obtaining employment. We have concluded that most of her residual disability with reference to her leg injury would disappear after three years or 156 weeks, approximately, and, therefore, find that the total loss of wages should be fixed at $8,580.00 of which amount the community is entitled to $7,535.00 and the separate estate to $1,045.00. Therefore, we hold that the award of $18,800.00 as set forth above is excessive and should be reduced to a total of $7,535.00.

Mrs. Fleta Ware Jones, individually, was awarded the sum of $75,000.00. Mrs. Jones was 27 years of age at the time of the accident, having previously been married to Joe L. Ware, the father of her four girls, and from whom she received no support, and had been separated for about four years. She supported herself as a waitress earning an average of $55.00 per week. Her claim included special damages of loss of 19 weeks (from August 8 to December 30) of wages or $1,045.00, and medical expenses for herself and her children of $2,121.57, constituting special damages of $3,166.57. Subtracting these amounts from the jury award, there remains approximately $71,833.43 allowed on account of personal injuries. These include in addition to pain and suffering, fractures of the right femur, the patella, the mandible, the condyle, the nasal septum, total loss of hearing in the right ear, multiple contusions, bruises and brain concussion. At the time of trial, November 15, 1966, Mrs. Jones still experienced residuals in the nature of pain from her leg, inability to stand for a sustained period of time, inability to fully bend her knee, and soreness and ir-

ritation resulting from the wires which were placed in her jaw bone. Her appearance presents a scarred forehead, face, neck and collar bone. The severance of nerves have left her with a total and permanent loss of hearing in one ear, and an absence of feeling in her lower lip and chin. This results in an inability to sense the presence of food or liquid on her lip or chin. She sustained multiple severe injuries and we are of the opinion she should receive substantial compensation but we find the award of $75,000.00, of which approximately $12,000.00 was granted for general damages, is excessive and the total award should be reduced to $43,166.57, of which latter amount, $3,166.57, is for special damages as set forth above.

Mrs. Fleta Ware Jones for the use and benefit of her minor child, Brenda Ware, was awarded the sum of $6,500.00. Brenda was six years old at the time of the accident. In addition to bruises, contusions and concussion, she sustained a through and through laceration of her upper lip which left a cosmetic defect. The surgeon required three layers of sutures to close the wound. She was hospitalized for three days. Dr. L. C. Butler, Jr., a plastic surgeon, was of the opinion that plastic surgery should be performed for the purpose of removing the scar and improving the muscle and line of the lip. This would require anesthesia and the estimated cost of this surgery is $509.00, after which there would be some permanent scarring. The award as made by the jury was excessive to the extent of $3,500.00, but the amount should include $509.00 for future plastic surgery. The total award is fixed at $3,509.00.

Mrs. Fleta Jones was allowed the sum of $500.00 for the use and benefit of her minor daughter, Janie Ware. The award for this four year old child is nominal, and although it appears the only injury received by Janie was a small laceration of the right eyebrow and required only one stitch, the child underwent severe shock and sustained bruises in the head-on collision. We find no occasion to modify this award.

J. E. Adams was awarded judgment for $1,832.90. This amount was allowed for medical expenses of Mrs. Adams amounting to $911.90 and $920.50 for estimated future medical expenses for corrective surgery. Parenthetically, we may add that the award of $1,832.90 reflects an error in addition of 50¢, $1,832.40 being the correct amount. The record indicates that Mrs. Adams will not submit to plastic surgery. The testimony of medical experts indicates the overall results thereof will probably be unsatisfactory. Therefore, the sum of $920.50 is disallowed and the award for $1,832.90 is reduced to $911.90.

Mrs. Bertha Adams was awarded the sum of $95,000.00. At the time of the accident she was 61 years of age and was a housewife. The greater portion of the award to Mrs. Adams was for injuries to her face and head. One of the attending surgeons, Dr. Albert L. Bicknell, testified the cosmetic results were the worst he had seen during his years of practice. She was thrown through the windshield headfirst and the greater portion of her face was described as hanging away from the bone. There were crushing facial injuries to the face, mouth, lips, nose and septum and turbi-

nates. After the accident she was in a critical condition from shock and loss of blood and underwent surgery which lasted two hours and forty-five minutes and necessitated approximately 400 sutures and ties. Nerve injuries involved muscle control and sensation. Some of the results include interference with eating and control of food inside of the mouth; she is unable to control saliva running from the corner of her mouth; cannot register expression on the right side of her face; has to speak out of one side of her mouth, and half of her right cheek and the right side of her nose and lips are completely numbed. As to the future, medical experts were in agreement that nothing could be done to improve her condition functionally, and that cosmetically it is doubtful that improvement from plastic surgery would be worth the trouble, time and expense. Other permanent residuals include inability to wear dentures, chronic gastritis and the psychological effect of disfigurement. We have reached the conclusion that a total award of $50,000.00 should be made, and accordingly, the jury verdict of $95,000.00 is so reduced.

In accordance with our findings, as set forth above, the awards in favor of Earl J. Jones as head and master of the community, is reduced from $18,800.00 to $7,535.00; the award in favor of Mrs. Fleta Ware Jones, individually, is reduced from $75,000.00 to $43,166.57; the award in favor of Mrs. Fleta Ware Jones for the use and benefit of her minor child, Brenda Ware, is reduced from $6,500.00 to $3,509.00; the award in favor of J. D. Adams as head and master of the community is reduced to $911.90, and the award in favor of Mrs.

Bertha Adams is reduced to the sum of $50,000.00. As so amended, the judgment from which appealed is affirmed. Cost of this appeal is taxed against appellees.

APPENDIX "B"

EARL JACKSON JONES et al.
v.
AETNA CASUALTY & SURETY COMPANY.

No. 48785.

Supreme Court of Louisiana.

June 20, 1967.

In re: Earl Jackson Jones et al. applying for certiorari, or writ of review, to the Court of Appeal, Second Circuit, Parish of Caddo. 198 So. 2d 523.

Writ refused. On the facts found by the Court of Appeal, we find no error of law in its judgment.

HAWTHORNE, SANDERS and SUMMERS, JJ., think the writ should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 602

FLETA A. JONES,

Petitioner

vs.

AETNA CASUALTY & SURETY COMPANY,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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LECOMTE, SHREVEPORT, LOUISIANA

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IN THE

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OCTOBER TERM, 1967

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FLETA A. JONES,

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vs.

AETNA CASUALTY & SURETY COMPANY,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

It is submitted that there are three fundamental bases for the Court to deny the present application for writs. They are:

(1) Petitioner failed to raise the issue sought to be reviewed by this Court in accordance with law;

(2) The petition for writs asks for a review of the decision of the wrong Court;

(3) The contention of petitioner is void of merit.

I.

Petitioner seeks to have declared illegal the present method of trial by jury in civil cases in the State of Louisiana. However, petitioner failed to raise this issue in accordance with the Louisiana law and at too late a stage in the proceedings.

Admittedly the question posed by petitioner was first sought to be raised in this action in the form of an application for a rehearing in the Louisiana Court of Appeal for the Second Circuit (R. 160, p. 6 of Petition for Writ).

This suit was originally instituted in a State Court of the State of Louisiana and was tried by jury at the request of petitioner. Liablity to petitioner was admitted by the defendant, respondent here (R. 424, 426, p. 5 of Petition for Writ). Considering the verdict of the jury exorbitant and excessive, respondent appealed to the Louisiana Court of Appeal for the Second Circuit seeking a reduction in the award of the jury. As correctly stated in the petition for writs on pages 3 and 4 thereof, Louisiana appellate courts review the facts as found by the trial court, sitting with or without a jury, as well as the awards and may amend, affirm or reverse, and may change the awards upward as well as downward. Appellate courts in Louisiana may, and frequently do, make awards when they have been totally denied by the trial court or jury.(1)

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(1) *Baughman v. Wells*, 171 So. 2d 759.

Since liability was admitted in this case, the appeal by respondent to the Louisiana Court of Appeal was and could have been only on the question of whether the award made by the jury was excessive and exorbitant. No other issue was presented at the trial.

Under Louisiana law constitutional questions *must* be raised by proper pleading in the trial court. Constitutional questions may not be raised for the first time on appeal and certainly not for the first time upon application for rehearing in the Appellate Court.

> *Allopathic State Board v. Fowler*, 50 La. Ann. 1358, 24 So. 809;
>
> *Succession of Fachan*, 179 La. 333, 154 So. 15;
>
> *Stovall v. City of Monroe*, 199 La. 195, 5 So. 2d 547;
>
> *Long v. Northeast Soil Conservation District*, 226 La. 824, 77 So. 2d 408.

There were a number of ways in which a constitutional question could have been properly raised.

Since the appeal was solely on a question of quantum petitioner could have raised the question by an objection in the Trial Court to the allowance of the appeal, either by written motion or verbal objection, since appeals in the Louisiana State Court system, although a matter of right in cases such as this, must be requested of and allowed by the trial Judge. She could have, in the event of an overruling of the objection to the appeal by the

trial Court, properly filed motion in the Court of Appeal to dismiss the appeal. Other methods were open to petitioner but she failed to avail herself of any of them and, as above shown, first sought to raise the constitutional question on application for a rehearing to the Appellate Court.

II.

The petition for writ in this case (p. 1 thereof) seeks a writ of certiorari to review the judgment and decree of the Supreme Court of Louisiana. The Supreme Court of Louisiana did not decide this case. The decision in this case is by the Louisiana Court of Appeal for the Second Circuit. The Supreme Court of Louisiana simply denied a writ of certiorari to review the decision of the Court of Appeal (R. 2, p. 1 of Petition for Writ). The record in this case has never been before the Supreme Court of Louisiana.

The petition for writ in this Court, since the Supreme Court of Louisiana has never decided any issue in this case, should have been directed to the Louisiana Court of Appeal for the Second Circuit. *Chicago and Eastern Ilinois Railroad Company v. Industrial Commission of Illinois*, 284 U.S. 296, 76 L. ed 304, 52 S. Ct. 151. Therein this Court stated:

> "The State Supreme Court, in the exercise of its discretion, declined to review the judgment; and the case is properly here on certiorari to the state circuit court."

III.

Tersely stated, petitioner contends that the present civil jury system permitting appeals on the facts and awards is not in keeping with Amendment VII to the Constitution of the United States and, therefore, under the due process clause of the Fourteenth Amendment the entire civil jury system in Louisiana is illegal and that it must be replaced with the common law jury system requiring civil jury trials in which a unanimous verdict of twelve is necessary on the facts and that such findings are beyond judicial review. Civil juries in Louisiana must be petitioned for not later than ten days after the service of the last pleading[2] and only nine of twelve jurors must concur in order to render a verdict.[3] The contention is illusory and contrary to an impressive line of decisions by the Supreme Court of the United States.

The first case in which there was directly considered the applicability of the Seventh Amendment to the states was *Edwards v. Elliot*, 88 U.S. 487, 21 Wall. 532, 22 L. ed 487, which dismissed the contention with the remark: "that it does not apply to trials in the State Courts." In 1876, just a few years after the adoption of the Fourteenth Amendment, the Supreme Court of the

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(2) Article 1732 of the Louisiana Code of Civil Procedure, which reads "A party may demand a trial by jury of any issue triable of right by a jury in a pleading filed not later than ten days after the service of the last pleading directed to such issue."

(3) Article 1795 of the Louisiana Code of Civil Procedure, which provides "In order to render any verdict, nine of the jurors must concur therein . . . . . ."

United States decided *Walker v. Sauvinet*, 92 U.S. 678, 2 Otto 90, 23 L. ed 678, in which was considered the applicability of the Seventh Amendment as it might relate to the states. After a jury trial, requested by the defendant, a mistrial resulted, and the matter was taken up on a writ of error. The Court definitely decided that the Seventh Amendment relates only to trials in the Courts of the United States and the various states, so far as the Seventh Amendment is concerned, are left to regulate trials in their own Courts in their own way. The Court further concluded that a trial by jury in suits at common law pending in the State Court is not a privilege or immunity which the states are forbidden by the Fourteenth Amendment to abridge.

Under the decision of the Supreme Court in Walker a state has the power to eliminate civil jury trials completely, and, since the greater includes the lesser, a state may provide for jury trials with such qualifications as it may deem appropriate. Louisiana has, in its wisdom, provided for fact review since 1816 when the Supreme Court of Louisiana first announced the validity of the principle in *Abat v. Doliolle*, 4 Mart. (O.S.) 316.

Louisiana does not stand alone in the nation as the only state which allegedly does violence to the Seventh Amendment. There are decisions respecting the laws of other states in which the holdings have followed the principles announced in Walker v. Sauvinet.

The Supreme Court of the United States decided in *New York Central Railroad Company v. White*, 243 U.S.

188, 61 L.ed 667 that an attack made on the workmen's compensation finding in New York without a jury, on the ground that a jury trial had been denied as guaranteed by the Seventh Amendment, was lacking in merit. The Court cited its previous opinion in Walker. Hence, with regard to workmen's compensation cases the rule was established and has continued to date that a trial by jury in a State Court, with strict observance of the Seventh Amendment, is not a fundamental guarantee under the Federal Constitution.

In *Curtis v. United States*, 262 U.S. 215, 67 L. ed 956 in which the validity of land patents determined by the California Courts came under fire on the charge that a jury trial in the State Courts of California contravened the Seventh Amendment, the Supreme Court of the United States decided that the deprivation of the right to trial by jury in a State Court does not deprive the parties of due process of law under the Federal Constitution.

Hardware Dealers Mutual Fire Insurance Company v. Glidden Company, 284 U.S. 151, 76 L. ed 214 involved an action in the Minnesota State Courts to recover an amount awarded in favor of an insured under a damage arbitration clause in a fire insurance policy on the ground that a jury trial was denied under the Seventh Amendment. The Court again decided that the proceedings were not controlled by the Seventh Amendment and such proceedings did not constitute a denial of due process under the Fourteenth Amendment.

Hence, it appears that for almost an entire century under an unbroken line of decisions by the Supreme Court of the United States there has been a consistent denial of any contention that a litigant in a Court of any state of the United States is entitled to a civil jury trial as that right existed under the common law in 1776.

The civil jury is not an immutable or indispensable adjunct in the administration of justice in America or anywhere else. It is not grounded upon any moral precept. It does not compare, even remotely, with the inherent rights of American citizens to life, liberty and the pursuit of happiness as set forth in the Declaration of Independence. Intrinsically it is not a basic right such as freedom of religion and speech and the concept of private property and personal freedom.

The only reason for civil juries in America is that England had them in 1776. Since England has virtually exterminated them,(4) civil juries continue to exist in America solely as a result of usage dating back to accidental adoption in 1776.

The civil jury exists only in America among the world's legal institutions. Much has transpired in the use of the civil jury since 1776 in Anglo-American law.

In many states and in the Federal Government, the civil jury system has been modified over its form as

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(4) Hubert, "Trial by Jury under the New Code of Civil Procedure" (La), 35 Tulane L. Rev. 520; Sarpy, "Civil Juries", 11 Loy. L. Rev. 243.

it existed at common law in 1776. For example, in Minnesota and New Jersey, a verdict by 10 of 12 prevails; in Arkansas and New Mexico 9 of 12, as in Louisiana, and in Virginia and Montana 8 of 12;(5) thus departing from the traditional unanimous verdict of the common law which has now been scrapped in England.

The precise origin, almost a thousand years ago, of the civil jury in English history is shrouded in mystery and the object of obscure speculation.(6)

De Tocqueville wrote a century and a half ago "Democracy in America," Vol. 1, p. 285: "When the English adopted trial by jury they were a semi-barbarous people; they all became, in course of time, one of the most enlightened nations of the earth; and their attachment to this institution seems to have increased with this increasing cultivation."

It thus appears that the civil jury was invented to overcome a condition of semi-barbarity in England, which perhaps continued on into early colonial days in the new world, at least in part.

The early views of Madison, Williamson, Randolph, Graham, Ellsworth, Mason, King, Richard Henry Lee, Wilson and others, framers of the Constitution which led to the adoption of the Seventh Amendment, are the subject of a recent and comprehensive law review article(7) Ham-

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(5) "Right of Trial by Jury", 15 DePaul L. Rev. 398.

(6) Ibid.

(7) Henderson "The Background of the Seventh Amendment", 80 Harvard Law Rev. 289.

ilton also expressed his grave doubts as to the efficacy of the civil jury[8] and observed that security of liberty is materially concerned only in the trial by jury in criminal cases.

It is difficult, if not impossible, to pinpoint any one event as the motivating cause for civil juries. It is true that judges were not the trained and educated jurists we have today and recourse was had to a group of peers. If that be a reason for the establishment of the civil jury, the reason no longer exists.

The language of the Seventh Amendment "in suits at common law" scarcely defines what it means. Traditionally, to seek some light there must be an examination of the difference between law, equity and admirality as they exsted in 1776 when there were separate courts of law and equity. There is no mathematical formula although the problem was tackled several years ago by Professor Fleming James of Yale University,[9] who concluded that there is no resolution. A brief survey of some pertinent innovations in American law since 1776 is significant because the development of the private corporation and the administrative appendages of our government, both Federal and State, have changed the original concept of "suits at common law" in so many respects

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(8) 12 Lodge, "The Works of Alexander Hamilton", 305 (2d ed. 1903).

(9) James, "Right to a Jury Trial in Civil Actions", 72 Yale Law Journal, 655.

that it is difficult to recognize the expanse of this gray area which becomes more obscure as time passes.

In the Federal System perhaps the first departure was the Interstate Commerce Act (49 U.S.C. 1) which created the Interstate Commerce Commission, a century after the Constitution was adopted and which virtually stripped the Courts of jurisdiction over much railroad litigation and eliminated many civil juries in "suits at common law." Next came the National Bankruptcy Act of 1898 (11 U.S.C. 1) which placed the administration of that act for most part under the aegis of referees and again juries were eliminated in suits by creditors in "suits at common law."

The Federal Trade Commission Act of 1915 (15 U.S.C. 41) clearly eliminated civil juries and the Railroad Employees Act placed damage claims under a commission so that no civil juries could be had. The Longshoremen's and Harbor Workers' Act *(33 U.S.C. 901)* effectively eliminated civil juries in claims before the Deputy Commissioners. New juryless Courts were established, such as the Court of Claims, the Tax Court and the Customs Court. Yet no one today seriously contends that the right to a jury trial at common law has rendered any of these Federal Agencies unconstitutional. Additionally, in the various states, we find juryless Compensation Commissions and Small Claims Courts with jurisdiction in excess of the Twenty Dollars referred to in the Seventh Amendment.

The "suits at common law" expression has been emasculated in a little less than two centuries to the point that no one knows what it really implies as a matter of law.

In the past decade much has been written on the civil jury. Chief Justice Arthur J. Vanderbilt led off with his treatise, "Judges and Jurors", and over twenty law review articles followed which New York University Professor Delmar Karlen, Secretary of the Institute of Judicial Administration, has industriously grouped together for convenience in his 1965 article "Can a State Abolish the Civil Jury?"(10)

Since it would seem to be settled that due process of law does not require a trial by jury in civil cases at all, it clearly follows that the right to an appeal may be circumscribed in such manner as the wisdom of the several states may indicate. An appeal under the common law was unknown. Due process is satisfied by one hearing. The right of appeal or review is not essential to due process.

> *District of Columbia v. Clawans*, 300 U. S. 617, 81 L. ed 843;
>
> *National Union of Marine Cooks & Stewards v. Arnold*, 348 U. S. 37, 99 L. ed. 46, 51.

As stated by this Court in the latter case: "While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process."

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(10) 1965 Wisc. Law Review 103

Louisiana, in granting the *right* of appeal thus went further than the common law. It is a right granted equally to plaintiff and defendant. It frequently results in awards being given plaintiff by the appellate court and by awards being increased.(11)

Appellate review in Louisiana is not a one-way street. The Appellate Courts of Louisiana may not only reduce an award made by a civil jury or a judge, sitting without a jury, but may, and often do, increase such awards as the appellate court may consider proper, as will be seen from the Fulco and Sumrall cases cited under footnote 11.

CONCLUSION

During its October, 1966 term, the Supreme Court of the United States has denied certiorari in two Louisiana State Court matters in which similar complaints were advanced against the validity of judicial review.(12)

It is respectfully submitted that the application for writ in this case should be denied.

Respectfully submitted,

RICHARD H. SWITZER
500 Slattery Building
Shreveport, Louisiana
Attorney for Respondent

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(11) *Baughman v. Wells*, 171 So. 2d 759 (no award by jury); *Fulco v. Lumbermens Mut. Cas. Co.*, 110 So. 2d 871; *Sumrall v. Aetna C. & S. Co.*, 124 So. 2d 168 (jury awards increased).

(12) No. 174, *Sule v. Missouri Pacific Railway Co.*, 17 L. Ed. 2d 58 and No. 388, *King v. Vico Insurance Co.*, 17 L. ed 2d 73.

CERTIFICATE

I, the undersigned member of the Bar of this Court, do hereby certify that a copy of the above and foregoing brief in opposition to application for writ of certiorari has been served upon the petitioner herein, by depositing the same in the United States mail, with adequate postage prepaid thereon, addressed to Mr. Robert B. Neblett, Jr. and Mr. Leonard Fuhrer, 602 Murray Street, Alexandria, Louisiana, and to Mr. Samuel C. Gainsburgh, 1718 National Bank of Commerce Building, New Orleans, Louisiana, her attorneys, this the 28 day of Sept., 1967.

Richard H. Switzer
500 Slattery Building
Shreveport, Louisiana.

COUNSEL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. 602

FLETA JONES, Etc.,

Petitioner,

versus

AETNA CASUALTY & SURETY COMPANY,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR CERTIORARI

May it please the Court:

The respondent has offered what it chooses to label "three fundamental bases" for the denial of the present petition for certiorari.

The first basis offered by respondent is that "petitioner failed to raise the issues sought to be reviewed by this Court" in the Court of First instance.

This contention of respondent is almost incredible, if we understand it correctly. The "issue" which petitioner seeks to have resolved ultimately in the instant case never arose, nor could it logically have arisen,

until the Louisiana *appellate* Court aggrieved petitioner's ward by *rendering* a judgment for less than the child's jury-found damages.

It is no answer to say that "since liability was admitted in this case, the appeal by respondent to the Louisiana Court of Appeal was and could have been only on the question of whether the award made by the jury was excessive and exorbitant." If it found the jury's verdict "excessive and exorbitant," the Court of Appeal could have, and we strenuously urge should have, ordered a *remittitur only* as an alternative to another jury trial. It is the failure of the Court to afford the alternative of a new trial to petitioner which raised for the first time in these proceedings the federal question upon which this Honorable Court's jurisdiction is invoked.

The second contention made by respondent is that "the petition for writs asks for a review of the decision of the wrong Court."

Respondent apparently urges that petitioner should have asked this Honorable Court to grant certiorari to the Louisiana Intermediate Court of Appeal, rather than to the Supreme Court of Louisiana.

This contention is best answered by referring this Honorable Court to its own proceedings in *Jackson v. Lykes Bros. Steamship Co., Inc.*, No. 575, October Term, 1966, decided May 8, 1967, on Writ of Certiorari to the *Supreme Court* of Louisiana (249 La. 460, 187 So. 2d 441) which had found "no error of law" in the

decision of the State Court of Appeal, Fourth Circuit (185 So. 2d 342); petitioner, in the instant case, has followed the identical procedure employed by Mrs. Jackson.

Finally, respondent says that "the contention of petitioner is void of merit."

This assertion by respondent, and the purportedly supporting portion of its brief in regard thereto, deals, of course, with the intrinsic merits of petitioner's case and, therefore, is prematurely made at this juncture. Moreover, it is pertinent to note that respondent has relied upon precedents which do not involve the right to trial by jury "in suits at common law" and has founded its attack on the merits of this case upon concepts not re-examined since *Walker v. Sauvinet*, 92 U. S. 678, 23 L.Ed. 667, which petitioner specifically asks this Honorable Court to re-evaluate, to repudiate and to overrule.

The applicability, *vel non*, of the Seventh Amendment to the Constitution of the United States is far too important a matter to be disposed of summarily by this Honorable Court.

The basic constitutional question posed by petitioner's application herein should be reconsidered only after review on *certiorari* and upon full and complete written and oral arguments of all parties directly and indirectly concerned with the intrinsic merits of this case. Therefore, petitioner's application for a writ

of certiorari to the Supreme Court of Louisiana should be granted.

All of which is

Respectfully submitted,

ROBERT B. NEBLETT, JR.
LEONARD FUHRER

BY_____

602 Murray Street
Alexandria, Louisiana
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PETITIONER

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New Orleans, Louisiana

CERTIFICATE

I, the undersigned member of the Bar of this Court, do hereby certify that a copy of the above and foregoing Brief in Reply to Respondent's Brief in Opposition to Petitioner's Application for a Writ of Certiorari has been served upon the Respondent herein by depositing the same in the United States Mails, air mail postage prepaid, addressed to Richard H. Switzer, Esq., 500 Slattery Building, Shreveport, Louisiana, at New Orleans, Louisiana, this _____ day of October, 1967.

Samuel C. Gainsburgh
1718 National Bank of
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Of Counsel

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IN THE

Supreme Court of The United States

October Term, 1967

No. 602

FLETA A. JONES, as Natural Tutrix
of the Minor, BRENDA WARE,
Petitioner,

versus

AETNA CASUALTY & SURETY COMPANY,
Respondent.

MOTION OF LOUISIANA TRIAL LAWYERS ASSOCIATION TO FILE AMICUS CURIAE BRIEF.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967

No. 602

FLETA A. JONES, as Natural Tutrix
of the Minor, BRENDA WARE,
Petitioner,

versus

AETNA CASUALTY & SURETY COMPANY,
Respondent.

MOTION OF LOUISIANA TRIAL LAWYERS ASSOCIATION TO FILE AMICUS CURIAE BRIEF.

Now comes Louisiana Trial Lawyers Association, and

On suggesting to the Court that:

1.

Movant is a non-profit Louisiana corporation composed, statewide, of over 250 attorneys interested in and actively engaged in representation of injured claimants and their survivors; that

2.

Movant subscribes to and endorses the view and belief that the right to an efficacious trial by jury in civil cases is a fundamental privilege which should be accorded the people of the State of Louisiana; and that

3.

Movant's membership, at its annual meeting of September 15, 1967, resolved to seek leave of Court to file a brief, as *amicus curiae*, urging that the granting of the petition filed herein by Fleta A. Jones; and that

4.

Respondent has refused to consent to the filing of Movant's brief.

Respectfully moves this Honorable Court for leave to file the accompanying brief, as *amicus curiae*, in the above numbered and entitled cause.

LOUISIANA TRIAL
LAWYERS ASSOCIATION

By_____

RAYMOND H. KIERR
1746 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
Attorney

Of Counsel:
PHIL TRICE
Lafayette, Louisiana

CERTIFICATE

I, the undersigned member of the Bar of this Court, do certify that a copy of the foreging motion has been served by hand upon counsel for Petitioner, Samuel C. Gainsburgh, 1718 National Bank of Commerce Building, New Orleans, and by air mail upon Richard H. Switzer, attorney for respondent, 500 Slattery Building, Shreveport, Louisiana, by placing same in the United States mail, properly addressed, and with adequate postage affixed, this _____ day of November, 1967, at New Orleans, Louisiana.

RAYMOND H. KIERR
1746 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112

ORDER

The foregoing motion considered:

Let Louisiana Trial Lawyers Association be, and it is hereby authorized and permitted to file its *amicus curiae* brief in this cause.

Washington, D. C., _____, 1967.

JUSTICE

SUPREME COURT, U. S.

NOV 27 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1967

No. 602

FLETA A. JONES,
As Natural Tutrix of the Minor,
BRENDA WARE,

Petitioner,

versus

AETNA CASUALTY AND SURETY COMPANY,

Respondent.

MOTION OF AMERICAN TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

AMERICAN TRIAL LAWYERS ASSOCIATION
SAMUEL LANGERMAN,
PRESIDENT
1400 Arizona Title Building
Phoenix, Arizona 85003

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967

No. 602

FLETA A. JONES,
As Natural Tutrix of the Minor,
BRENDA WARE,
Petitioner,

versus

AETNA CASUALTY AND SURETY COMPANY,
Respondent.

MOTION OF AMERICAN TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF *THE PETITION FOR A WRIT OF CERTIORARI*

TO THE HONORABLES THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW comes AMERICAN TRIAL LAWYERS ASSOCIATION and ON SUGGESTING TO THE COURT that:

1. American Trial Lawyers Association is a national organization composed of more than 20,000 lawyer-members:

2. Movant subscribes to and advocates the belief that trial by jury in civil cases is a fundamental privilege of American citizenship;

3. The right of efficacious trial by civil jury is preserved to all litigants in all courts by part one of the Seventh Amendment to the Constitution of the United States;

4. The instant application transcends the case itself and offers this Honorable Court an opportunity to prescribe the bounds and limits of State authority to erode fundamental due process of law as applied to civil jury trials by the Constitution of the United States;

5. The action of the state courts of which the instant application complains deprives petitioner's ward of her basic right to have a genuinely disputed issue of material fact finally determined in the tribunal where the witnesses appeared and where their testimony could be fully and fairly assayed;

6. Such action is specifically in derogation of the due legal process embodied in Amendments V, VII and XIV of the Constitution of the United States and should not be sanctioned in the courts of Louisiana or of any other State; and that

7. An answer to the basic, underlying question presented by the instant application, to-wit, the applicability of the Seventh Amendment of the Constitution of the United States to the several states of the Union.

is important to the nation as a whole and merits this Court's full review and consideration:

Respectfully moves this Honorable Court to grant the application for certiorari filed herein and to review the question presented thereby upon a thorough study thereof, with due consideration to the views of all interested parties, including Movant, as *amicus curiae*.

AMERICAN TRIAL
LAWYERS ASSOCIATION

By_____
Samuel Langerman, President
1400 Arizona Title Building
Phoenix, Arizona 85003

Certificate

I, the undersigned member of the Bar of this Court, do hereby certify that a copy of the foregoing Motion has been served upon counsel for the Petitioner, Samuel C. Gainsburgh, 1718 National Bank of Commerce Building, New Orleans, Louisiana, and upon counsel for the Respondent, Richard H. Switzer, 500 Slattery Building, Shreveport, Louisiana, by depositing the same, airmail postage prepaid, in the United States Mails, properly addressed and with adequate postage affixed, this _____ day of November, 1967, at

_____
Samuel Langerman
1400 Arizona Title Building
Phoenix, Arizona 85003